

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JAMILLA CLARK and ARWA AZIZ, on Behalf of
Themselves and Others Similarly Situated,

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

ANALISA TORRES, District Judge:

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18 Civ. 2334 (AT)

ORDER

The Court has reviewed Defendant's letter dated August 25, 2023, requesting leave to file a motion seeking an adverse inference as a discovery sanction against the Plaintiff Class. ECF No. 304. An adverse inference is a "severe sanction." *In re Keurig Green Mtn. Single-Serve Coffee Antitrust Litig.*, 341 F.R.D. 474, 527 (S.D.N.Y. 2022). At minimum, Defendant must show that the Plaintiff Class had a "culpable state of mind." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). Defendant's letter does not support such a showing. The named Plaintiffs collaborated with Defendant by sending deposition notices and designing a survey. ECF No. 304 at 2. Although Defendant argues that the response rate for depositions and the survey indicates culpability, *id.* at 3, Defendant has pointed to no case law in support of its position. The response rate by itself is not sufficient for a finding of culpability, particularly in light of the potential "*in terrorem* effect" of absent class member discovery that, if not carefully managed, risks "turning the 'opt-out' class action into an impermissible opt-in class action." *Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67, 70 (S.D.N.Y. 2020). Defendant's motion is more appropriately presented for trial. *See Mali v. Fed. Ins. Co.*, 720 F.3d 387, 392–93 (2d Cir. 2013).

Accordingly, leave to file the motion is DENIED without prejudice. Defendant may renew its motion in advance of trial.

The parties are directed to adhere to the briefing schedule for Plaintiffs' motion for partial summary judgment. *See* ECF No. 298.

SO ORDERED.

Dated: August 29, 2023
New York, New York



ANALISA TORRES
United States District Judge